

*W. F. Lieberman*



**Comptroller General  
of the United States**

Washington, D.C. 20548

## **Decision**

**Matter of:** Sunspot Garden Center & Country Craft Gift Shop

**File:** B-237065.2

**Date:** February 26, 1990

Edward Gavalla, for the protester.  
Kurt Anderson, for Anderson Reclamation & Construction, Inc., an interested party.  
Justin P. Patterson, Esq., Department of the Interior, for the agency.  
Paul Lieberman, Esq., and John F. Mitchell, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### **DIGEST**

1. Cancellation of solicitation and resolicitation is appropriate where procurement encompassing construction work was conducted, and award was made, under solicitation which did not include required Davis-Bacon wage determination.
2. Quoter has no legal entitlement to anticipated profits under canceled solicitation.

### **DECISION**

Sunspot Garden Center & Country Craft Gift Shop protests the cancellation of a solicitation issued by the Department of the Interior, National Park Service, which had resulted in the award of purchase order No. PX20009D217, for the installation of a 2-rail fence, and for mulch and riprap placement at the Delaware Water Gap National Recreation Area. Sunspot asserts that the cancellation and resolicitation was improper, and that after termination of the awardee's purchase order, Sunspot should have been awarded "damages," and the remainder of the work under the initial solicitation.

We dismiss the protest in part and deny it in part.

The initial request for quotations (RFQ) was issued to four firms on August 21, 1989, with an August 24 due date. Three firms, including Sunspot, submitted quotations by the due

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date, and at a public opening on that date, Sunspot's price of \$14,985 was low. The fourth firm, Chestnut Hill, was given verbal authorization by the contracting activity to submit a late quotation and it submitted the low quotation of \$12,000 on August 29, and was awarded a purchase order on September 19.

Sunspot protested this award to our Office on September 22. Interior terminated the purchase order on October 12 on the basis of improprieties in the solicitation procedure and because the RFQ encompassed construction work, but did not contain the required Davis-Bacon Act, 40 U.S.C. § 276(a) (Supp. IV 1986), wage determination, and the contracting activity had erroneously orally advised Chestnut Hill that Davis-Bacon rates were not required under this procurement. As a result of this action, our Office dismissed the protest as academic. At the time of the termination, Chestnut Hill had completed approximately 50 percent of the work required and Interior issued a new RFQ for the remaining work, under which Sunspot elected not to submit a quotation.

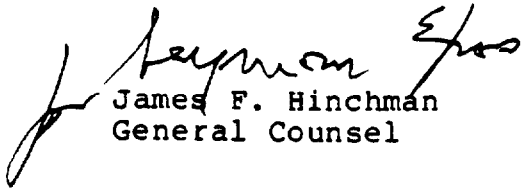
Instead, Sunspot now protests the cancellation and resolicitation because "the Davis-Bacon situation was caused by an error of the contracting officer," and because of the "damages" which it has suffered as a result of the diminished scope of the new solicitation. Sunspot requests either the award of damages in the amount of 30 percent of its quoted price, representing anticipated profit, or payment of anticipated profit of 30 percent of the already-completed work and award of the remaining half of the work under the original RFQ.

There is no basis for payment of Sunspot's alleged damages since both the courts and our Office have consistently held that anticipated profits may not be recovered even where a firm has been wrongfully denied a contract by the government. See East West Research, Inc.--Reconsideration, B-233623.2, Apr. 14, 1989, 89-1 CPD ¶ 379; Department of the Interior; Presentations South, Inc.--Request for Reconsideration, B-224842.3, Aug. 15, 1988, 88-2 CPD ¶ 148.

Further, where a solicitation such as this one, which encompasses elements of construction, erroneously fails to include Davis-Bacon minimum wage rates, and results in an award which does not include these rates, we have held that this provides a clear and compelling basis for cancellation and resolicitation. Prestige Constr. Co., B-224327, Nov. 19, 1986, 86-2 CPD ¶ 590; Southern Sys., Inc., B-193844, Feb. 14, 1980, 80-1 CPD ¶ 133. Accordingly, the

agency properly determined to terminate the purchase order and resolicit the remainder of the requirement.

The protest is denied in part and dismissed in part.

James F. Hinchman  
General Counsel